

1 THE HONORABLE JAMES L. ROBART
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 ANNA PATRICK, DOUGLAS MORRILL,
9 ROSEANNE MORRILL, LEISA GARRETT,
10 ROBERT NIXON, SAMANTHA NIXON,
11 DAVID BOTTONFIELD, ROSEMARIE
12 BOTTONFIELD, TASHA RYAN, ROGELIO
13 VARGAS, MARILYN DEWEY, PETER
14 ROLLINS, RACHAEL ROLLINS, KATRINA
15 BENNY, SARA ERICKSON, GREG
16 LARSON, and JAMES KING, individually and
17 on behalf of all others similarly situated,

18 Plaintiffs,

19 v.

20 DAVID L. RAMSEY, III, individually; HAPPY
21 HOUR MEDIA GROUP, LLC, a Washington
22 limited liability company; THE LAMPO
23 GROUP, LLC, a Tennessee limited liability
company,

Defendants.

Case No. 2:23-cv-00630-JLR

**PLAINTIFFS' RESPONSE TO THE
LAMPO DEFENDANTS DAVID
RAMSEY, III AND THE LAMPO
GROUP, LLC'S MOTION FOR
JUDGMENT ON THE PLEADINGS
REGARDING PLAINTIFFS'
CONVERSION CLAIM**

Noting Date: May 10, 2024

I. INTRODUCTION

Defendants' motion for a judgment on the pleadings should be denied for three reasons. First, Defendants are not entitled to relief under Fed. R. Civ. P. 12(c) because a party cannot dispute all the material facts relevant to a 12(c) motion and then move for dismissal on the grounds that the facts are undisputed. *Murphy v. Dep't of Air Force*, 326 F.R.D. 47 (D.D.C. 2018) (K. Brown Jackson, J.). Doing so creates genuine issues of material fact that preclude a Fed. R. Civ P. 12(c) motion.

Second, this motion is essentially a Fed. R. Civ. P. 59 motion for reconsideration filed more than 28 days after the Court granted Plaintiffs the right to amend the Complaint against objection, which violates Fed. R. Civ. P. 59(e). Defendants identify nothing new in the briefing or the facts of the case that would merit a renewed challenge to the sufficiency of the pleadings, after their futility argument was rejected because on the grounds that identifiability was a question of fact. Dkt. No. 53 at 13.

Third, the Amended Complaint does adequately allege that the converted money is identifiable and traceable. As the Amended Complaint states, the Ramsey Defendants and Reed Hein each kept extensive records of the customers referred from Dave Ramsey precisely, so Reed Hein could calculate the proper payment to the Ramsey Defendants for the Ramsey referrals. *E.g.*, Dkt. No 56 at 34-35 (¶¶145-153). It is plausible that those records would reconcile any identifiability issues raised by the difference between the overall payments to Reed Hein and the payments made by Ramsey referrals. When viewed through an un-truncated version of the relevant case law, that is adequate to survive a Fed. R. Civ. P. 12(c) motion. As

the Court ruled when it previously rejected Defendants' argument, that turns the identifiability of money into a question of fact. Dkt. No. 53 at 13.

II. ARGUMENT

a. Standard of Review

A Rule 12(c) motion for judgment on the pleadings is evaluated under the same standards as a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See Baker v. Colonial Life & Accident Ins. Co.*, No C1400319JLR, 2014 WL 1744164, at *2 (W.D.Wash. Apr. 30, 2014). As such, the “complainant must state sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

“Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law.” *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir., 1989); *see also Fleming v. Pickard*, 581 F.2d 922, 925 (9th Cir., 2009) (when considering a 12(c) motion, the court “must accept all factual allegations in the complaint as true . . . Judgment on the pleadings is properly granted where there is no issue of material fact in dispute”). “The court must assume the truthfulness of the material facts alleged in the complaint. All inferences reasonably drawn from these facts must be construed in favor of the responding party.” *Creighton v. City of Livingston*, 628 F.Supp.2d 1119, 1207 (E.D.Cal., 2009) (citing *Westlands Water Dis. V. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir., 1998)); *see also National Lifeline Ass’n v. Batjer*, 2023 WL 1281676 at *5-6 (9th Cir., Jan. 31, 2023) (Baker, J., concurring in judgment) (describing which facts should be taken as true in the Rule

12(c) context). “Not only must the court accept all material allegations as true, but the complaint must be construed, and all doubts resolved, in the light most favorable to the plaintiff.” *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir., 1988).¹

As other district courts have explained, “a party seeking judgment on the pleadings under Rule 12(c) must . . . demonstrate that the law entitles him to win given the undisputed facts that have been alleged in both parties’ pleadings.” *Murphy v. Dept. of Air Force*, 326 F.R.D. 47, 49 (D.D.C., 2018) (K. Brown Jackson, J.); *see Thoms v. Adv. Tech. Systems Co., Inc.*, 2021 WL 5450453 (M.D. Ala., Nov. 22, 2021) (“If a review of the competing pleadings reveals a material dispute of fact, judgment on the pleadings must be denied”) (internal quotation marks omitted); *Sommerville v. West Town Bank & Trust*, 2020 WL 8256358 (D. Md., Dec. 4, 2020) (“A motion for judgment on the pleadings under [Rule 12(c)] seeks a remedy that is available and appropriate only in certain circumstances—namely, to ‘dispos[e] of cases in which there is no substantive dispute that warrants the litigants and the court proceeding further.’”) (second alteration in original and quoting 5C Arthur R. Miller, Mary Kay Kane, & A. Benjamin Spencer, *Federal Practice and Procedure* § 1368 (3d ed.)). The undisputed nature of factual

¹ Plaintiffs acknowledge that *Hal Roach Studios* and *McGlinchy* predate *Twombly* and *Iqbal* and thus that certain standards applicable to Rule 12(b)(6) motions differed at the time *Hal Roach Studios* and *McGlinchy* were decided. However, neither *Twombly* nor *Iqbal* directly addresses Rule 12(c) motions and the quoted portions of *Hal Roach Studios* and *McGlinchy* address considerations specific to Rule 12(c) motions. Further, following *Twombly* and *Iqbal*, both *Hal Roach Studios* and *McGlinchy* continue to be favorably cited by courts in the 9th Circuit in the Rule 12(c) context. *See, e.g.*, *Ironshore Indemnity, Inc. v. Rogas*, 2023 WL 6999435 (9th Cir., Oct. 24, 2023) (citing *Hal Roach Studio*); *Keithly v. Intellius Inc.*, 764 F.Supp.2d 1257, 1260 (W.D. Wash., 2011) (citing *McGlinchy*).

1 allegations in the pleadings is demonstrated where the other party admits the truth of the
 2 allegations. *See Murphy*, 326 F.R.D. at 50.

3 **b. The Identifiability of Funds is a Fact Issue and Not Appropriate for**
 Resolution through a Rule 12(c) Motion.

4 The identifiability and identification of funds is a fact-based inquiry that is not
 5 appropriate for resolution through a motion for judgment on the pleadings. *See Entegra Power*
 6 *Group LLC v. Dewey & Leboeuf LLP*, 493 B.R. 421, 436 (Bankr. S.D.N.Y., 2013) (“Tracing
 7 [funds] is a fact intensive inquiry that cannot be resolved on the motions for judgment on the
 8 pleadings”). The court previously determined that whether Plaintiff’s funds remain identifiable
 9 with respect to the Ramsey Defendants is an issue of fact. *See* Dkt. 53 at 10:9-13:3 (December
 10 5, 2023 Order on Plaintiffs’ Motion to Amend). The Ramsey Defendants have not submitted
 11 new facts, and all facts and pleadings before the court now were also before the Court on when
 12 ruling on Plaintiffs’ Motion to Amend. There is no compelling reason to change course from
 13 the December 5, 2023 ruling on this same issue and the Ramsey Defendants’ motion should
 14 be denied.

15 **c. Plaintiffs Have Stated a Plausible Claim for Conversion**

16 Under Washington law, “[c]onversion is the unjustified, willful interference with a
 17 chattel which deprives a person entitled to the property of possession.” *In re Marriage of*
 18 *Langham & Kolde*, 106 P.3d 212, 218 (Wash. 2005) (quoting *Meyers Way Dev. Ltd. P’ship v*
 19 *Univ. Sav. Bank*, 910 P.2d 1308, 1302 (Wash. Ct. App. Div. 1, 1996)). Money may be the
 20 subject of conversion. *Westview Inves., Ltd. v. U.S. Bank Nat. Ass’n*, 138 P.3d 638, 646 (Wash.
 21 Ct. App. Div. 1, 2006). “There is nothing in the nature of money making it an improper subject

1 of [conversion] so long as it is capable of being identified.” *Davin v. Dowling*, 262 P. 123, 125
 2 (Wash. 1927) (quoting *Hazelton v. Locke*, 104 Me. 64, 71 A. 651 (Me., 1908)). Defendants
 3 suggest that money must be “delivered at one time, by one act and in one mass,” but that is not
 4 the full quote. Dkt. No. 76 at 6:14-15. A fuller quote is: “when delivered at one time, by one
 5 act and in one mass . . . or when the deposit is special and the identical money is to be kept for
 6 the party making the deposit, or when wrongful possession of such property is obtained.” *Id.*
 7 (citations omitted).² Wrongful possession or retention is a question of fact. *See Brown ex rel.*
 8 *Richards v. Brown*, 157 Wash. App. 803, 818 (Wash. Ct. App. Div. 1, 2010) (“Whether Hogg
 9 wrongfully received or retained the \$20,000 reverse mortgage proceeds is a question of fact.”).

10 The Ramsey Defendants argue that Plaintiffs have not stated sufficient information in
 11 the Amended Complaint regarding the element of identifiability of funds. *See* Dkt. No. 76 at
 12 5:7-6:2. They do not argue Plaintiffs have failed to state a claim regarding any other elements
 13 of their conversion claim. *See generally* Dkt. No. 76.

14 On its face, the Amended Complaint implies Plaintiffs may be able to identify the funds.
 15 The Amended Complaint includes specific and detailed allegations about extensive customer
 16 records and tracking by the Ramsey Defendants and Reed Hein & Associates (“Reed Hein”),
 17 including information about referrals, payments from Reed Hein customers, and payments to
 18

19
 20 ² Plaintiffs note that the sentences in *Hazelton* immediately following those quoted in *Davin*
 21 are relevant to the Ramsey Defendants’ identifiability argument: “In *Moody v. Keener*, 7 Por.
 22 Ala. 2181, it was held that in actions of tort only the same certainty is required as in
 23 indictments, that it was not necessary to set out the money verbatim, that the description in
 a general manner is sufficient. This is in accordance with decisions of this State.” *Hazelton*
v. Locke, 104 Me. 164, 167, 71 A. 661 (Me., 1908).

1 the Ramsey Defendants. *See* Dkt. No. 55, ¶¶ 12, 122, 135, 145-153. Among the elaborate
 2 detailing in ¶¶145-153 is the following:

3 145. The Lampo Group, Dave Ramsey, Happy Hour Media Group, and
 4 Reed Hein & Associates kept extensive and contemporaneous records
 5 of Ramsey listeners referred to Reed Hein by The Lampo Group and
 6 Dave Ramsey.

7 146. The customer referral records were important to the business of all
 8 parties because Reed Hein paid The Lampo Group and Dave Ramsey
 9 both a flat fee for advertising and a per-lead rate for customer referrals.

10 147. Happy Hour Media Group, The Lampo Group, and Dave Ramsey
 11 tracked which customers were referred to Reed Hein by Dave Ramsey
 12 through uniquely assigned discount codes and special phone numbers
 13 available only through advertisements placed on programs produced
 14 and broadcast by The Lampo Group.

15 ***

16 149. The Lampo Group created an online system, dubbed Ramsey
 17 Frontman, through which it embedded forms on its website to refer
 18 website visitors to Reed Hein. The system collected and maintained
 19 records of who was referred to Reed Hein. The Lampo Group was, in
 20 part, *paid on a per-lead basis for Ramsey Frontman referrals.*

21 Dkt. No. 55 at 34-35 (italics added). Furthermore, Plaintiffs allege existing Reed Hein records
 22 include payment amounts and referral sources for each Plaintiff and each other customer

1 referred by the Ramsey Defendants. *Id.* at ¶¶ 151-152. That is all plausible, considering that
 2 "Reed Hein gave Ramsey a portion of the money Ramsey advised his listeners to spend." *Id.*
 3 at ¶ 122.

4 In sum, Plaintiffs allege that: 1) contemporaneous Reed Hein customer records exist for
 5 each Plaintiff and each other customer referred by the Ramsey Defendants; 2) those records
 6 include referral sources and payment amounts; 3) the Ramsey Defendants were, in part, paid
 7 for each referred Reed Hein customer; 4) records exist showing which Reed Hein customers
 8 were referred by the Ramsey Defendants and on which dates, including records related to
 9 referred customers for whom the Ramsey Defendants were paid on a per-lead basis; 5) records
 10 of each payment from Reed Hein to the Ramsey Defendants exist.

11 It is plausible that, given the extent of the alleged recordkeeping and the number of
 12 interactions between Reed Hein and the Ramsey Defendants related to each referred customer,
 13 that Plaintiffs could sufficiently identify the funds.

14 **d. Material Facts in the Pleadings Relevant to the Identifiability Issue are
 15 Disputed, and a Rule 12(c) Motion is Not a Proper Vehicle for the Relief
 16 Sought**

17 A defendant who disputes the facts alleged in a complaint cannot seek Fed. R. Civ. P.
 18 12(c) relief because by claiming those facts are undisputed. *Murphy*, 326 F.R.D. at 47-48. As
 19 the United States Court for the District of Columbia explained, a Fed. R. Civ. P. 12(c) motion
 20 differs with a Fed. R. Civ. P. 12(b) motion in precisely that regard. In contrast to a Fed. R. Civ.
 21 P. 12(b) motion,

22 [a] Rule 12(c) motion is thus filed after the defendant has submitted
 23 an answer, see Fed. R. Civ. P. 12(c), and such a motion relies on
 both sets of pleadings (i.e., the plaintiff's complaint and the

1 defendant's answer) to support an argument made by either party
 2 about the merits of the dispute at hand...unlike a Rule 12(b)(6)
 3 motion, a Rule 12(c) motion asks the court to render "a judgment on
 4 the merits ... by looking at the substance of the pleadings and any
 5 judicially noted facts." Thus, a Rule 12(c) motion requires the court
 to consider and decide the merits of the case, on the assumption that
 the pleadings demonstrate that there are no meaningful disputes as
 to the facts such that the complaint's claims are ripe to be resolved
 at this very early stage in the litigation.

6 *Murphy*, 326 F.R.D. at 48–49 (internal citations omitted). As a consequence:

7 a party seeking judgment on the pleadings under Rule 12(c) must
 8 make a different showing than a defendant who requests that the
 9 complaint be dismissed under Rule 12(b)(6)—i.e., the Rule 12(c)
 movant must demonstrate that the law entitles him to win given the
 undisputed facts that have been alleged in both parties' pleadings.

10 *Id.* The District of Columbia district court therefore allowed the defendant to bring a CR 12(c)
 11 motion only *after* amending the Answer to "accept[] the material allegations of fact as true..."
 12 *Id.* at 50. In other words, a defendant cannot simultaneously deny allegations and then use the
 13 allegations it denied to seek judgment on the pleadings.

14 In their Answer to Plaintiffs' Amended Complaint, the Ramsey Defendants deny many
 15 of the material facts they rely upon to disprove identifiability. Plaintiffs posit that paragraphs
 16 12, 122, 135, and 145-153, the paragraphs identified and described above, are the most relevant
 17 to the identifiability issue. The Ramsey Defendants deny the factual allegations in each of
 18 those paragraphs in their answer. *See, e.g.*, Dkt. 63 ¶ 12 ("The Lampo Defendants lack
 19 sufficient knowledge or information to admit or deny the allegations in this paragraph, and
 20 therefore deny those allegations"); ¶ 122 ("The Lampo Defendants deny the allegations in this
 21 paragraph"); ¶ 135 ("The Lampo Defendants deny that David Ramsey was ever paid by Reed
 22 Hein. The Lampo Defendants lack sufficient knowledge or information to admit or deny the
 23

1 remainder of the allegations in this paragraph, and therefore deny those allegations"); ¶ 149
 2 ("The Lampo Defendants deny that Ramsey Frontman collected or maintained records. As to
 3 any remaining allegations in this paragraph . . . the Lampo Defendants lack sufficient
 4 knowledge or information to admit or deny the allegations in this paragraph, and therefore
 5 deny those allegations"); ¶ 153 ("The Lampo Defendants deny that they 'referred' any listeners
 6 to [Reed Hein]. The Lampo Defendants lack sufficient knowledge or information to admit or
 7 deny the allegations in this paragraph as to records kept or maintained by [Reed Hein], and
 8 therefore deny those allegations").

9 The material facts relevant to identifiability are thus disputed in the pleadings and
 10 judgment on the pleadings would be inappropriate.

11 e. **Defendants' Argument that Dismissing the Conversion Claims Against**
Happy Hour Necessitates the Dismissal of the Conversion Claim Against
Them Misunderstands the Difference Between the Intermingled Funds of
Happy Hour and the Non-Intermingled Funds Paid to Ramsey

12 Defendants argue that the Court's dismissal of the conversion claim necessitates
 13 dismissal of the conversion claims against the Ramsey Defendants because the Ramsey
 14 Defendants were further down the monetary chain of custody than Reed Hein. That
 15 misunderstands the reasons why the Court dismissed the conversion claim against Happy Hour.
 16 Happy Hour was a marketing company with various sources of income other than Reed Hein.
 17 The Court found that putting the money in the operating account of Happy Hour made it
 18 indistinguishable from its own funds. But by withdrawing it to pay the Ramsey Defendants on
 19 behalf of Reed Hein it disentangled those funds, identified them as Reed Hein money, and
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 21
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1 resumed the pass-through nature of its role. In this case, they were Reed Hein funds paid to the
 2 Ramsey Defendants specifically for referring to the Ramsey customer class.

3 As Defendants acknowledge, the Amended Complaint also alleges that the Ramsey
 4 Defendants received \$30,000,000 to refer \$70,000,000-worth of Ramsey listeners to Reed
 5 Hein. Recognizing the fungibility of money, it stands to reason that if Reed Hein paid The
 6 Ramsey Defendants \$30,000,000 for sending \$70,000,000 of referrals to Reed Hein, then they
 7 were necessarily paid a subset of the money from Ramsey referrals.

8

9 **f. The Court Should Not Hear this Motion for Reconsideration**

10 The Court should not hear this motion because it violates Fed. R. Civ. P. 59(e) by asking
 11 for reconsideration greater than 28 days after the Court's order denying Defendants' motion to
 12 dismiss the conversion claim. Nothing material has changed in the case or the Plaintiffs' filings
 13 since that time and the Defendants fail to demonstrate otherwise. The only new information
 14 Defendants raise is the fact that Plaintiffs opted not to amend the Complaint after the Court
 15 dismissed conversion claims against Happy Hour, which is immaterial to the Court's
 16 consideration.

17 **g. If the Court Dismisses the Conversion Claims, It Should Do So Without
 18 Prejudice and With Leave to Amend**

19 If the court dismisses Plaintiffs' conversion claims it should do so without prejudice. Most
 20 importantly, the Amended Complaint could be amended to create a "Conversion Class,"
 21 including the entire base of Reed Hein customers, who were Reed Hein's lone source of
 22 revenue. If so, it would necessarily be the case that any money paid to the Ramsey Defendants
 23

1 on behalf of Reed Hein can be traced to those customers and distributed to those customers
 2 *pro rata.*

3 The Ramsey Defendants argue that Plaintiffs should not be allowed to amend because they
 4 chose not to amend the Complaint when the Court dismissed their conversion claim against
 5 Happy Hour. Defendants do not provide authority, argument, or any support for that reasoning.
 6 When Plaintiffs declined to amend following the court's dismissal of their conversion claim
 7 against Happy Hour, they specifically did so without waiving "any objection or right to amend
 8 the complaint at a later date." Dkt. No. 75. The circumstances here are different. *See* Dkt. 74
 9 at 17:1-3 (noting Happy Hour's motion "raise[d] arguments specific to its own role in the
 10 events underlying Plaintiffs' claims that were not before the court when it granted Plaintiff's
 11 motion for leave to amend"). If the Court dismisses Plaintiffs' conversion claim against the
 12 Ramsey Defendants, it should do so without prejudice.

13 III. CONCLUSION

14 For the reasons stated above, the Court should not dismiss Plaintiffs' conversion claim
 15 against the Ramsey Defendants. Plaintiffs have stated a plausible claim and unresolved issues
 16 of material fact preclude dismissal of their conversion claim through a Rule 12(c) motion.
 17 Should the Court nonetheless dismiss Plaintiffs' conversion claim against the Ramsey
 18 Defendants, it should do so without prejudice and with leave to amend.

19 DATED this 3rd day of May, 2024.
 20

21 *I certify that this memorandum contains 3,212 words, in compliance with the Local
 22 Civil Rules.*

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